

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Request for Review of the	)	
Decision of the	)	
Universal Service Administrator by	)	
	)	
Shepherd Independent School District	)	File No. SLD-258144
Shepherd, Texas	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	
	)	
Changes to the Board of Directors of the	)	CC Docket No. 97-21
National Exchange Carrier Association, Inc.	)	

**ORDER**

**Adopted: November 7, 2002**

**Released: November 8, 2002**

By the Telecommunications Access Policy Division, Wireline Competition Bureau:

1. Before the Telecommunications Access Policy Division is a Request for Review filed by Shepherd Independent School District (Shepherd), Shepherd, Texas.<sup>1</sup> Shepherd requests review of a decision by the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (Administrator), denying one of Shepherd's Funding Year 2001 requests for discounts under the schools and libraries universal service support mechanism.<sup>2</sup> For the reasons set forth below, we deny the Request for Review.

2. Under the schools and libraries universal service support mechanism, eligible schools, libraries, and consortia that include eligible schools and libraries, may apply for discounts for eligible telecommunications services, Internet access, and internal connections.<sup>3</sup> The Commission's rules require that the applicant make a bona fide request for services by filing

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<sup>1</sup> Letter from Shepherd Independent School District to Federal Communications Commission, filed January 29, 2002 (Request for Review).

<sup>2</sup> *Id.* Previously, Funding Year 2001 was referred to as Funding Year 4. Funding periods are now described by the year in which the funding period starts. Thus the funding period that began on July 1, 1999 and ended on June 30, 2000, previously known as Funding Year 2, is now called Funding Year 1999. The funding period that began on July 1, 2000 and ended on June 30, 2001 is now known as Funding Year 2000, and so on.

<sup>3</sup> 47 C.F.R. §§ 54.502, 54.503.

with the Administrator an FCC Form 470,<sup>4</sup> which is posted to the Administrator's website for all potential competing service providers to review.<sup>5</sup> After the FCC Form 470 is posted, the applicant must wait at least 28 days before entering an agreement for services and submitting an FCC Form 471, which requests support for eligible services.<sup>6</sup> SLD reviews the FCC Forms 471 that it receives and issues funding commitment decisions in accordance with the Commission's rules.

3. In the *Fifth Reconsideration Order*, the Commission established rules to govern how discounts would be allocated when total demand exceeds the amount of funds available and a filing window is in effect.<sup>7</sup> These rules provide that requests for telecommunications and Internet access service for all discount categories shall receive first priority for available funds (Priority One services), and requests for internal connections shall receive second priority (Priority Two services).<sup>8</sup> Thus, when total demand exceeds the total support available, SLD is directed to give first priority for available funding to telecommunications service and Internet access.<sup>9</sup> Any funding remaining is allocated to requests for support for internal connections, beginning with the most economically disadvantaged schools and libraries, as determined by the schools and libraries discount matrix.<sup>10</sup> Schools and libraries eligible for a 90 percent discount would receive first priority for the remaining funds, which would be applied to their request for internal connections. To the extent that funds remain, the Administrator would continue to allocate funds for discounts to eligible applicants at each descending single discount percentage, e.g., eighty-nine percent, eighty-eight percent, and so on until there are no funds remaining.<sup>11</sup> In Funding Year 2001, funding of discounted internal connections was available only for schools with discount rates of 86% or higher.

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<sup>4</sup> Schools and Libraries Universal Service, Description of Services Requested and Certification Form, OMB 3060-0806 (September 1999) (FCC Form 470).

<sup>5</sup> 47 C.F.R. § 54.504(b); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9078, para. 575 (1997) (*Universal Service Order*), as corrected by *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Errata, FCC 97-157 (rel. June 4, 1997), *affirmed in part*, *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (affirming *Universal Service First Report and Order* in part and reversing and remanding on unrelated grounds), *cert. denied*, *Celpage, Inc. v. FCC*, 120 S. Ct. 2212 (May 30, 2000), *cert. denied*, *AT&T Corp. v. Cincinnati Bell Tel. Co.*, 120 S. Ct. 2237 (June 5, 2000), *cert. dismissed*, *GTE Service Corp. v. FCC*, 121 S. Ct. 423 (November 2, 2000).

<sup>6</sup> 47 C.F.R. § 54.504(b), (c); Schools and Libraries Universal Service, Services Ordered and Certification Form, OMB 3060-0806 (October 2000) (FCC Form 471).

<sup>7</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fifth Order on Reconsideration and Fourth Report and Order in CC Docket No. 96-45, 13 FCC Rcd 14915 (1998) (*Fifth Order on Reconsideration*).

<sup>8</sup> 47 C.F.R. §§ 54.502, 54.503.

<sup>9</sup> The annual cap on federal universal service support for schools and libraries is \$2.25 billion per funding year. See 47 C.F.R. § 54.507(a).

<sup>10</sup> *Fifth Order on Reconsideration*, 13 FCC Rcd at 14938, para. 36.

<sup>11</sup> 47 C.F.R. § 54.507(g)(1)(iii).

4. In Funding Year 2001, in an effort to ensure that the priority rules were not violated, SLD implemented new review procedures for requests that included both Priority One and Priority Two services.<sup>12</sup> Under its new procedures, SLD would automatically reclassify a request that the applicant designated telecommunications or Internet access (Priority One) as one entirely consisting of Priority Two services if 30% or more of the services requested were found to be Priority Two.<sup>13</sup>

5. Shepherd appeals the denial of Funding Request Number (FRN) 650204, which requested discounted Internet access.<sup>14</sup> Documentation indicated that this request sought support for an upgrade from a T-1 line connection to an “Asynchronous Transfer Mode” connection to the Internet.<sup>15</sup> On July 23, 2001, SLD issued a Funding Commitment Decision Letter, indicating that the category of service for FRN 650204 had been changed from Internet access to internal connections and denying the request on the grounds that “[t]he funding cap will not provide [less than] 80% discount to be funded.”<sup>16</sup> Shepherd was entitled to a discount of only 75% for FRN 650204.<sup>17</sup>

6. Shepherd appealed to SLD, asserting that the reclassification of routers provided as part of Internet access should not have occurred.<sup>18</sup> Shepherd asserted that its Internet services is provided by Education Service Center Region VI, and that this is the same Internet service for which Shepherd has received funding in previous years.<sup>19</sup> Shepherd acknowledged that, in previous years, it had applied for part of the service, a part that it described as “Annual Support,” as internal connections and been denied funding. It asserted that it had incorporated Annual Support into its Internet access request in Funding Year 2001 to make clear that this was actually supporting Internet access.

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<sup>12</sup> See SLD Web Site, <[http://www.sl.universalservice.org/reference/471\\_App\\_Guid\\_Docs/471\\_dozen.asp](http://www.sl.universalservice.org/reference/471_App_Guid_Docs/471_dozen.asp)> (last updated April 15, 1999) (“To correctly apply the Rules of Priority (fund Telecommunications and Internet Access first, then Internal Connections beginning with neediest), SLD must ‘scrub’ telecommunications and Internet Access requests to assure no Internal Connections are included. A piece of equipment at the user’s location listed in one of these categories risks having the entire service redefined as Internal Connections.”); see also SLD Web Site, <<http://www.sl.universalservice.org/reference/ServCategories.asp>> (describing review procedure used in Funding Year 2000 and new procedure applied in Funding Year 2001).

<sup>13</sup> See SLD Web Site, <http://www.sl.universalservice.org/reference/ServCategories.asp>.

<sup>14</sup> Request for Review at 1; FCC Form 471, Shepherd Independent School District, filed January 18, 2001 (Shepherd Form 471).

<sup>15</sup> Shepherd Form 471, Attachment 5.

<sup>16</sup> Letter from Schools and Libraries Division, Universal Service Administrative Company, to J. Kevin Mathis, Shepherd Independent School District, dated July 23, 2001, at 6 (Funding Commitment Decision Letter).

<sup>17</sup> Shepherd Form 471 at 5.

<sup>18</sup> Letter from J. Kevin Mathis, Shepherd Independent School District, to Schools and Libraries Division, Universal Service Administrative Company, filed August 20, 2001 (Appeal to SLD), at 1.

<sup>19</sup> *Id.* at 1-2.

7. Shepherd attached a breakdown of costs, which specified \$9,419.06 for recurring connectivity costs, \$7,371.00 for non-recurring equipment installation costs, and \$6,077.23 for equipment maintenance costs.<sup>20</sup> Shepherd argued that all costs were directly related to Internet access, and that, even if the installation and maintenance costs were not funded, the connectivity costs, which had been funded in previous years, should be funded again in Funding Year 2001.<sup>21</sup>

8. Following the appeal, SLD contacted Shepherd to determine whether the service was properly characterized as Internet access or internal connections.<sup>22</sup> It specifically asked, among other things, whether the equipment at issue in the request would be owned by the district or the vendor.<sup>23</sup> Shepherd replied that the Cisco 3810 router would be owned by Shepherd, and that the “Regional Hub” would be owned by CommNet Consortia, of which Shepherd was a member.<sup>24</sup>

9. On October 3, 2001, SLD denied the appeal. It stated that, “[s]ince your Form 471 included 30% or more internal connections services: {Charges associated with router, equipment involved in the ATM Upgrade, and the maintenance/installation of these items} within your Block 5 request for priority one services, your Form 471 request has been recategorized as a request for internal connections services.”<sup>25</sup> SLD concluded that “[f]or Funding Year [2001], there are not sufficient funds to provide internal connections discounts to applicants at your discount rate.”<sup>26</sup> Shepherd then filed the pending Request for Review.

10. In Shepherd’s Request for Review, it largely reiterates the arguments that it raised in its Appeal to SLD.<sup>27</sup> After reviewing these arguments, we find that SLD correctly categorized FRN 650204 as internal connections. In the *Tennessee Order*, the Commission held that when evaluating funding requests, SLD should determine if services nominally characterized by the applicant as Internet access (Priority 1) were actually internal connections (Priority 2) by looking for certain specified indicia of an internal connections service.<sup>28</sup> These indicia include whether

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<sup>20</sup> Appeal to SLD at 2, attachment.

<sup>21</sup> Appeal to SLD at 2.

<sup>22</sup> E-mail from Andrew Eisley, Schools and Libraries Division, Universal Service Administrative Company, to J. Kevin Mathis, Shepherd Independent School District, dated September 12, 2001.

<sup>23</sup> *Id.*

<sup>24</sup> E-mail from J. Kevin Mathis, Shepherd Independent School District, to Schools and Libraries Division, Universal Service Administrative Company, dated September 18, 2001 (Shepherd E-mail).

<sup>25</sup> Letter from Schools and Libraries Division, Universal Service Administrative Company, to J. Kevin Mathis, Shepherd Independent School District, dated October 3, 2001, at 1.

<sup>26</sup> *Id.*

<sup>27</sup> Compare Request for Review, attachment, with Appeal to SLD, attachment.

<sup>28</sup> *Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator, Request for Review by Integrated Systems and Internet Solutions, Inc., of the Decision of the Universal Service Administrator, Request for Review by Education Networks of America of the Decision of the Universal Service Administrator, Federal-State Joint Board on Universal Service, Changes to the Board of*

the equipment being used to provide the service will be owned by the applicant and whether the equipment is subject to a lease-purchase arrangement providing the applicant with ownership at some future date.<sup>29</sup> Here, Shepherd stated that the equipment installation and maintenance costs were for equipment that would be owned by Shepherd, either directly or through a consortium.<sup>30</sup> The equipment costs are therefore not properly classified as Internet access.<sup>31</sup> Further, because these costs are 30% or more of FRN 650204, SLD properly reclassified and denied the entire request.

11. Shepherd also asserts that its service has been fully funded in the previous two years.<sup>32</sup> However, it is established that the failure to detect violations in prior funding years does not preclude SLD or the Commission from requiring compliance with the Commission's rules in later year.<sup>33</sup> Otherwise, applicants would have no incentive to comply with program rules once they discovered a prior violation was erroneously undetected. Thus, Shepherd bore the risk that its application would be denied in Funding Year 2001 despite the failure of SLD to detect a similar violation in prior funding years, assuming that such violations occurred.

12. Shepherd also argues that the FCC Form 471 Instructions did not specify that a nominally Priority-One request with 30% or more Priority Two internal connections would be recharacterized as entirely Priority Two.<sup>34</sup> In fact, SLD's practice of reclassifying Priority One requests that contain Priority Two services as Priority Two is stated on its website, and has been

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*Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 and 97-21, Order, 14 FCC Rcd 13734, para. 39 (1999) (*Tennessee Order*).

<sup>29</sup> *Id.*

<sup>30</sup> Shepherd E-mail.

<sup>31</sup> It is possible that, under the *Tennessee Order*, this equipment should be classified as ineligible wide-area-network components, rather than internal connections components. We need not address this issue, because funding for the request would be denied in either case.

<sup>32</sup> Request for Review at 2.

<sup>33</sup> See *Request for Review by School for Language and Communication Development, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-246025, CC Dockets No. 96-45 and 97-21, Order, DA 02-1785, para. 9 (Wireline Comp. Bur. rel. August 6, 2002); see also, generally, *In re Applications of Roy E. Henderson d/b/a Pueblo Radio Broadcasting Service Sanchez Communications, Inc., Hal S. Widsten Classic Media, Inc., Buena Suerte Broadcasting Corp., O-V Communications for Construction Permit for a New FM Station in Oro Valley, Arizona*, 5 FCC Rcd 6278, para. 6 (1990) (failure of FCC staff to detect errors in an application does not excuse applicant from compliance with the Commission's rules). See *Request for Review of the Decision of the Universal Service Administrator by Ruidoso Municipal School District Ruidoso, New Mexico, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 and 97-21, Order, 15 FCC Rcd. 15547, n.10 (2000) (citing *In Re Applications of Mary Ann Salvatoriello*, 6 FCC Rcd 4705 (1991), citing *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990) (Erroneous advice from a government employee has never been found to create estoppel against the Federal Government, particularly when the relief requested would be contrary to an applicable statute or rule. Persons relying on informal advice given by Commission staff do so at their own risk.)).

<sup>34</sup> Request for Review at 2.

noted and affirmed by the Bureau in numerous orders.<sup>35</sup> In addition, this reclassification mechanism is an internal review procedure implemented by SLD to ensure compliance with the Priority rules established by the Commission.<sup>36</sup> Shepherd certainly had notice of the Commission's priority rules and therefore was or should have been aware of "the need to carefully segregate its service requests" for Priority One and Priority Two services.<sup>37</sup> The lack of discussion in the FCC Form 471 Instructions of the Priority review procedure does not, therefore, warrant relief from that procedure.

13. ACCORDINGLY, IT IS ORDERED, pursuant to authority delegated under sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), that the Request for Review filed by Shepherd Independent School District, Shepherd, Texas, on January 29, 2002 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Mark G. Seifert  
Deputy Chief, Telecommunications Access Policy Division  
Wireless Competition Bureau

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<sup>35</sup> See SLD website, Reference Area, "Service Categories: SLD Adjustment Process," <<http://www.sl.universalservice.org/reference/ServCategories.asp>>; see also, e.g., *Request for Review by Kansas Public Schools, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-174935, CC Dockets No. 96-45 and 97-21, Order, 16 FCC Rcd 22516 (Com. Car. Bur. 2001).

<sup>36</sup> *Id.*

<sup>37</sup> *Request for Review by Southeast Webster Community Schools, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-166575, CC Dockets No. 96-45 and 97-21, Order, 17 FCC Rcd 11122, n. 35 (Wireline Comp. Bur. 2002).